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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1949

BURTON B. PADDOCK, Trustee in Bankruptcy of the Estate of GLOBE AIRCRAFT CORPORATION, Bankrupt,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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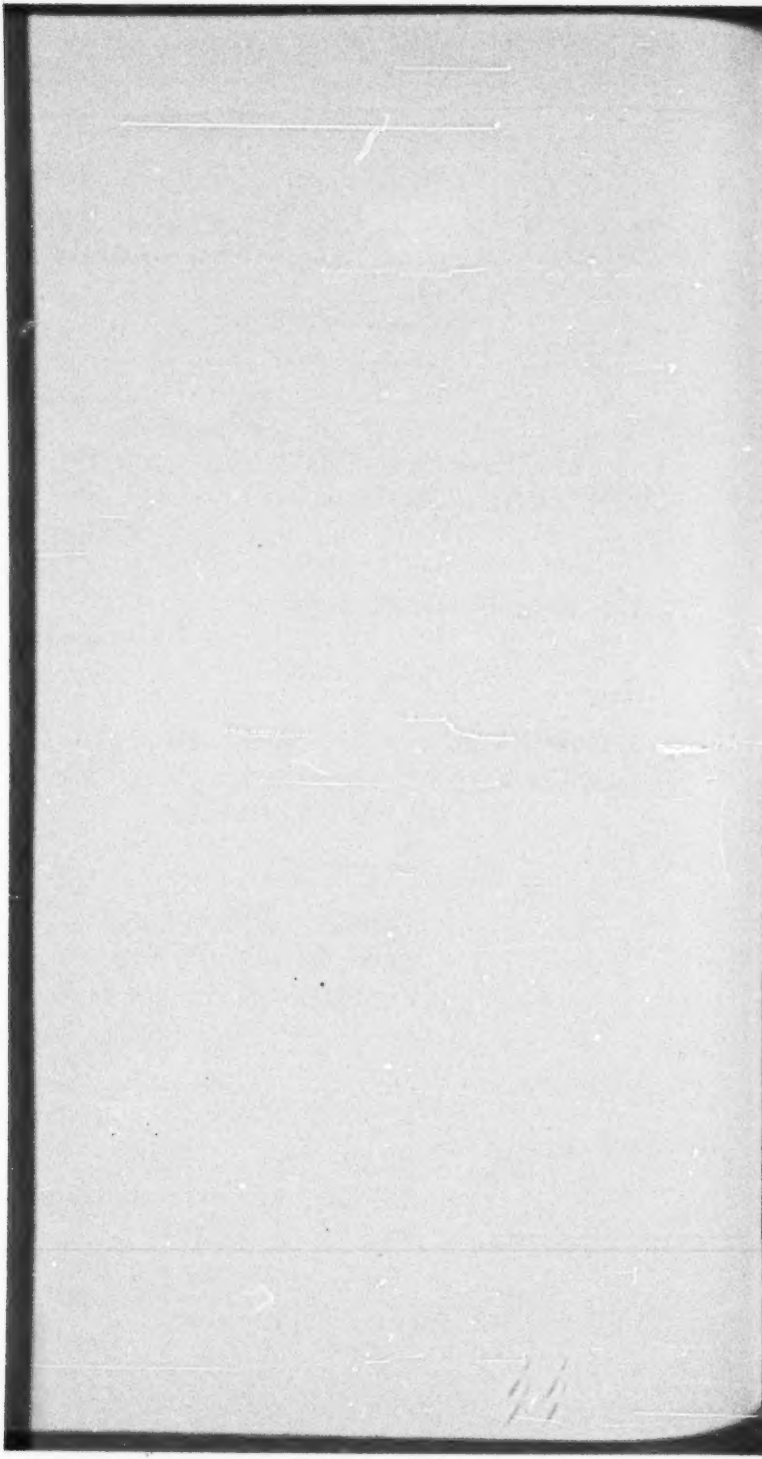

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Burton B. Paddock, Trustee in Bankruptcy of the Estate of Globe Aircraft Corporation, Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered December 9, 1949, with petition for rehearing overruled February 18, 1950, reversing a judgment of the United States District Court for the Northern District of Texas.

## OPINIONS BELOW

The memorandum opinion of the District Court (R. 506) is not officially reported. The opinions of the Court of Appeals (R. 530, 583, 585) are reported in 178 F (2d) 394 and 180 F (2d) 121.

## JURISDICTION

The original opinion of the Court of Appeals for the Fifth Circuit was filed December 9, 1949, and judgment was entered on December 22, 1949. The petition for rehearing was timely filed and entertained by the said Court, which, on January 26, 1950, withdrew a portion of its original opinion, and, on February 18, 1950, denied the petition for rehearing and filed an additional opinion.

The jurisdiction of this Court is invoked under Section 24c of the Bankruptcy Act (11 U.S.C.A., Sec. 47); under Section 1254 of the Judicial Code, as amended, (28 U.S.C.A., Sec. 1254) and Section 2101 (c) of the Judicial Code, as amended, (28 U.S.C.A., Sec. 2101(c)).

## STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the appendix, *infra*, pages 36 to 46.

## SUMMARY STATEMENT

This case involves two claims set forth in a proof of claim filed by the United States of America (Government) in the bankruptcy proceedings of Globe Aircraft Corporation (Globe), pending in the District Court of the United States for the Northern District of Texas. (R. 3). After hearing the evidence, the Referee in Bankruptcy made certain findings of fact and conclusions of law, and entered an order disallowing both claims. (R. 467). Upon petition for review, the Referee made additional findings of fact and conclusions of law (R. 482). The District Court, adopting the findings of the Referee, affirmed his order (R. 507). The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court, and rendered judgment for the Government, allowing both claims (R. 530). A petition for rehearing (R. 546) was thereafter filed by the Petitioner herein, and after submission of briefs, the petition for rehearing was denied (R. 591).

The bankruptcy proceedings herein were initiated by an involuntary petition in bankruptcy filed against Globe on Decmeber 27, 1946. A petition for reorganization under Chapter X of the Bankruptcy Act was filed in the pending bankruptcy proceedings, in which reorganization proceedings trustees were appointed. The petition for reorganization was dismissed on April 21, 1947. In the reinstated bankruptcy proceedings an adjudication in bankruptcy was entered and, on May 5, 1947, the Petitioner herein was appointed and duly qualified as Trustee.

The consideration for the first Government claim was recited in a "Certificate of Settlement" (R. 7) of the General Accounting Office, dated February 12, 1948, attached to and made part of the proof of claim, in which certificate it is stated that various contracts between Globe and the War Department contained the following warranty:-

> "Covenant Against Contingent Fees.-The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.";

that under an agreement between Globe and Production Engineering Co., Inc. (Production), dated January 19, 1942, as amended, it was provided that certain percentages as commissions for service rendered would be paid to Production by Globe for securing Government contracts and subcontracts; that Production was not a bona fide established commercial or selling agent maintained by Globe for the purpose of securing business; that the commissions paid by Globe to Production were in violation of the covenant against contingent fees; and that the amount "for refund" to the Government was $383,527.47.

The consideration for the second claim was recited in a like "Certificate of Settlement" (R. 11), dated February 12, 1948, attached to and made part of the proof of claim, in which certificate it is stated that claims for refund of excessive profits realized by Globe under Government contracts and subcontracts had been determined for 1944 and 1945 by the War Contracts Price Adjustment Board. The excessive profits for 1944 were not in dispute and are not involved in this petition for certiorari. As to the excessive profits for 1945, the Certificate of Settlement states that it was determined by the War Contracts Price Adjustment Board, by order dated April 4, 1947, that Globe had derived gross excessive profits of $200,000.00 for that year (R. 13).

To the proof of claim, as last amended, the Trustee (Petitioner herein) filed amended objections, answer and counterclaim (R. 125-142). Upon the issues raised, testimony was presented before the Referee (R. 156-466). After hearing and argument, the Referee made findings of fact and conclusions of law, and entered an order disallowing both the contingent fee claim of $383,527.47 and the renegotiation claim of $200,000.00. (R. 467-473).

With regard to the contingent fee claim, the Referee had found that Globe and Production had entered into a contract whereby Production was to act as sales representative for Globe to assist in the sale of Globe products to foreign governments, the United States and private companies and that such contract, as amended and supplemented, was in continuous opera-

tion until the early part of 1946 and was duly carried out by the said parties (R. 469); that Production was a qualified selling agency within the intent and meaning of the exceptive clause (last sentence) of the covenant against contingent fees (R. 468); that, throughout, the Government had full knowledge of the contract between Globe and Production and was fully advised of all payments due and made thereunder by Globe to Production (R. 469, R. 483); that the Secretary of War, acting properly within the scope of the authority granted to him under Executive Order No. 9001, did not annul any of the contracts with Globe and did not deduct from the contract prices the amount of any commissions due Production (R. 469); that Globe's government contracts and subcontracts were fixed price contracts and there were no illegal wrongful or oppressive influences or circumstances surrounding the entering of such contracts (R. 483); that Production represented several other concerns and received compensation for services rendered to them (R. 484); that all such contracts were fully, faithfully and diligently performed by Globe and the Government received full value for the work performed thereunder (R. 483); and that, even if there were a breach of the warranty as contended, the Government did not sustain any damage as a result thereof (R. 469, R. 483).

Based upon the foregoing findings, the Referee concluded with respect to the contingent fee claim. "—that the existence of the contract between Globe and Production Engineering Company, Inc., as well

as the making of payments there-under, did not constitute a breach of the warranties against contingent fees as contained in the contracts between Globe and Claimant; that in any event, Claimant rightfully elected as to the course of action which it desired to pursue, and no additional remedy is available to Claimant; that in any event, the warranties against contingent fees as contained in the contracts between Globe and Claimant were not liquidated damage clauses; that in any event, the allowance of the claim in the amount of $383,527.47 would be a penalty within the intent and meaning of Section 57(j) of the Bankruptcy Act; that in any event, the Claimant is estopped to assert a claim herein in the amount of $383,527.47 against the Trustee and this bankrupt estate." (R. 471).

With regard to the renegotiation claim covering 1945 excessive profits, the Referee had found that the proceedings before the War Price Adjustment Board were held after the date of the filing of the bankrupcy petition and were conducted without knowledge and consent of the bankruptcy court and without any participation therein by the Trustee under direction of the bankruptcy court (R. 470); that, in 1945, Globe did not earn any excessive profits requiring any refund under the provisions of the Renegotiation Act (R. 471, R. 483); that prior to the date of the filing of the bankruptcy petition, the War Contracts Price Adjustment Board called upon Globe to furnish certain information with regard to its income and profits for 1945 (R. 484); and that there was no competent evidence before the bankruptcy court with regard to

the proceedings conducted by the War Price Adjustment Board in conformance with the law relating to the 1945 excessive profits (R. 470).

> Based on such findings, the Referee concluded with respect to the renegotiation claim, —"that the 1945 profits of Globe were reasonable, and that no refund is due under Renegotiation. It is the further opinion of this court that even if it can be said that there is evidence of profits subject to some extent to refund by way of Renegotiation for the year 1945, there are no pleadings to authorize this court to either estimate the amount thereof, or to prescribe a manner for the liquidation of same; that if there is any available procedure for the liquidation of any such claim for refund of excess profits, the orderly administration of this estate would be unduly delayed thereby; that Claimant objected to the jurisdiction and right of this court to in any manner consider and establish the amount of the refund, if any, due for excess profits; that for all such reasons it is the opinion of the court that the claim for refund of 1945 excess profits is not allowable;" (R. 472).

After hearing and argument on the Government's petition for review, the District Court adopted the original and additional findings of fact and conclusions of law of the Referee and affirmed his order disallowing the contingent fee claim and the 1945 renegotiation claim. (R. 508-510).

Upon appeal by the Government to the United States Court of Appeals for the Fifth Circuit, that Court

eversed the judgment of the District Court and allowed both claims (R. 530).

In construing the exceptive clause of the covenant against contingent fees providing that

> "This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business",

the Court of Appeals ruled that Production did not meet the required test of the exception, in that Production was an independent agency retained, but not "supported", by Globe, and therefore was not "maintained" by Globe within the dictionary definition of that term, and that the payment of contingent fees by Globe to Production constituted a breach of the covenant (R. 532).

In construing the Government's "right to annul the contract, or, in its discretion, to deduct from the contract price—the amount of such—contingent fees", the Court of Appeals ruled that such right of action was not created by the Executive Order, but was wholly contractual; that the two permissive self-help remedies given by this clause did not exclude judicial remedies; and that the Government, by its claim, is asserting this right of recovery as a judicial remedy independent of the self-help remedy "to deduct" (R. 534).

Having decided that the right *to recover* was a judicial remedy that was not excluded but was available to the Government for a breach of the covenant against contingent fees, the Court of Appeals ruled that the Government's claim was allowable in the amount of the contingent fees and, although the contract self-help remedy was not exercised, allowed the same recovery as though it had been exercised, and did not restrict the amount of the claim to the actual damages sustained which otherwise would have been legally recoverable under the judicial remedy invoked.

In construing the Government's "right,—in its discretion, to deduct from the contract price—the amount of such—contingent fees," the Court of Appeals ruled that the Government's claim was for liquidated damages and not for a penalty (R. 535).

With regard to whether the payments made by the Government to Globe, with full knowledge of all the facts, constituted a proper exercise of "its discretion", as provided in the covenant, the Court of Appeals treated such payments as voluntary and ruled that "the defense of voluntary payment is not good against the United States" (R. 535).

With regard to the jurisdiction of the bankruptcy court to consider and determine on the merits the Trustee's objection to the renegotiation claim for 1945 excessive profits, the Court of Appeals ruled that under the Renegotiation Act of 1942 the jurisdiction to hear and determine whether or not amounts accrued or received on contracts with the Government were excessive, was vested exclusively in the War Contracts

Price Adjustment Board, subject to review by the Tax Court only (R. 542) that the Trustee was "precluded under the terms of the renegotiation act from asserting any defense to said claim" (R. 543). On rehearing the Court held that the initiation of the renegotiation proceedings prior to the filing of the petition in bankruptcy and the determination by the Board, by its order entered after the filing of the petition in bankruptcy, "created a situation within the contemplation" of Section 63a(5) of the Bankruptcy Act, "wherein 'provable debts reduced to judgment after the filing of the petition—' were * * * debts that may be proved and allowed against the estate" (R. 588).

The Court of Appeals did not, in this situation, consider the applicability of the provisions of Section 57d of the Bankruptcy Act, requiring a claim unliquidated at the date of bankruptcy to be liquidated "within the time and in the manner directed by the court".

## QUESTIONS PRESENTED

1.

(Under Contingent Fee Claim)

Where, in War Department contracts for the production of war materials, the warranty against contingent fees made a part thereof as prescribed by Executive Order No. 9001 (promulgated under the War Powers Act, 50 U. S. C. A., App., sec. 611) provided that

"This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.",

is a bona fide established selling agency, employed by the contractor on a contingent fee basis for the purpose of generally selling the products of the contractor to foreign governments, the United States and private companies, and otherwise independent of and not supported by the contractor, *maintained by the contractor for the purpose of securing business* within the intent and meaning of the Executive Order and warranty?

2.

(Under Contingent Fee Claim)

Is the Government's "right to annul the contract, or, in its discretion to deduct from the contract price . . . the amount of such . . . contingent fees", a right which is wholly contractual, or a right which is created solely by the Executive Order No. 9001 so that such remedies are an essential part of the right to annul or deduct, and, therefore, exclusive?

3.

(Under Contingent Fee Claim)

If the remedies to annul or deduct do not exclude judicial remedies to which the Government may resort for alleged breach of the warranty, may the Government, proceeding under a judicial remedy, invoke the contract remedy for the determination of the amount recoverable, namely, the amount of the contingent fee

paid a contractor to a selling agency, or is the Government limited in its recovery, in the judicial remedy invoked, to the actual loss sustained by it by reason of the alleged breach?

4.

(Under Contingent Fee Claim)

Under fixed price contracts is the Government's "right . . . to deduct from the contract price . . . the amount of such . . . contingent fees", a claim for liquidated damages or a debt due to the Government as a penalty not allowable under Section 57j of the Bankruptcy Act (11 U. S. C. A., sec 93j) except to the extent of pecuniary loss sustained as therein provided?

5.

(Under Contingent Fee Claim)

Where, upon breach of the warranty against contingent fees, the Government does not annul the contract, but permits the contractor to complete performance, is there a discretion in the War Department, upon payment to the contractor of the contract price, to deduct or not to deduct the amount of the contingent fees?

6.

(Under Contingent Fee Claim)

Where, with full knowledge of an agreement between a contractor and a selling agency for the payment of contingent fees and of all payments due and made thereunder, the Government did not annul the contract with the contractor and did not deduct the

contingent fees from the contract price, but paid the contractor the contract price, did such payment by the Government to the contractor constitute the exercise by the Government of its discretion not to deduct?

7.

(Under Renegotiation Claim)

Whether the bankruptcy court under the Bankruptcy Act or the War Contracts Price Adjustment Board and the Tax Court on review under the Renegotiation Act (50 U.S.C.A., App., Sec. 1191 (c)(1) and (e)(1) has the exclusive jurisdiction to liquidate an unliquidated claim for excessive profits against a bankrupt estate, where the renegotiation proceedings have been commenced prior to the filing of the petition in bankruptcy, but the claim for excessive profits had not been determined as of the date of such filing?

8.

(Under Renegotiation Claim)

Assuming that the jurisdiction to determine a claim for excessive profits is exclusively in the War Contracts Price Adjustment Board, is the Government, nevertheless, required by Section 57d of the Bankruptcy Act (11 U.S.C.A., sec. 93d), to apply to the bankruptcy court and obtain its consent to the determination by the War Contracts Price Adjustment Board, where such determination had not been made at the time of the filing of the petition in bankruptcy?

9.

(Under Renegotiation Claim)

Where an unliquidated claim against a bankrupt is reduced to judgment in another tribunal after the filing of the petition in bankruptcy and before the bankrupt's discharge, without the consent of the bankruptcy court, as required by Section 57d (11 U. S. C. A., sec. 93d), does Section 63a(5) of the Bankruptcy Act (11 U. S. C. A., sec. 103a(5) ) make such judgment conclusive and allowable in the bankruptcy proceedings?

## REASONS RELIED UPON FOR THE ALLOWANCE OF THIS WRIT

I

(Contingent Fee Claim)

The warranty against contingent fees, made a part of contracts with the Government, as prescribed by Executive Order No. 9001, raises several important unsettled questions of Federal law.

1. It should be settled by this Court whether an independent bona fide established agency *retained* by a contractor under a contingent fee agreement for procuring business, including contracts with the Government, was "*maintained by the contractor for the purpose of securing business*" within the intent and meaning of the exceptive clause of the warranty.

The Judge Advocate General of the Army, in a gloss written in 1945 (set forth in a footnote to the case of Reynolds v. Goodwin-Hill Corp., (C. C. A. 2d 1946), 154 F. 2d 553), said, as to the exceptive clause in the warranty against contingent fees:

> "This provision is directed against payment of fees for the use of influence, real or imaginary, in obtaining Government contracts. It does not prohibit payments by a contractor to (1) a bona fide agent or (2) bona fide selling agencies or commercial agencies engaged in business of representing more than one contractor in dealing with other parties generally"

In the Reynolds case above cited, and later in Bradley v. American Radiator Corp. (C. C. A. 2d 1947), 159 F. 2d, 39, involving suits on claims for commissions by a selling agent against a contractor, the Court of Appeals, construing the scope and meaning of the exceptive clause, differentiated, by way of dictum, with respect to the payment of contingent fees between an agent employed generally to drum up business for the contractor and a person employed to procure a specific contract.

The Court of Appeals for the Fifth Circuit, in the decision herein sought to be reviewed, held that "*maintained by the contractor*" excluded a bona fide *independent* established selling agency.

A definitive interpretation is vital to the determination of rights arising under such contracts with the

Government, not only as between the Government and contractors but also as between contractors and selling agencies.

2. It should be settled by this Court whether a warranty against contingent fees made a part of a contract, as required by Executive Order No. 9001 promulgated pursuant to Section 611 of the War Powers Act of 1941, is statutory in its origin, so that the remedies expressed in the warranty are an essential part of the right to annul the contract or to deduct the commissions, and are exclusive of judicial remedies.

Prior to Executive Order No. 9001, an agreement by a contractor to pay contingent fees to a selling agency for securing Government contracts was held, as between the contractor and the agency, to be against public policy. (Providence Tool Co. v. Norris, 69 U.S. 45, 17 L. E. 868). But we find no statute or decisional law which gave or recognized any right in the Government to make a money recovery from the contractor as a consequence of such agreement. Nor do we find, since the promulgation of the Executive Order, any reported cases in which the Government's right to annul the contract or to deduct from the contract price the amount of the contingent fees was litigated.

If this right to annul or to deduct be regarded as statutory in its origin, then the express remedies provided are exclusive and the maxim invoked by the Court of Appeals, "ubi jus, ibi remedium", permitting a judicial remedy, is not applicable.

In the leading case of Pollard v. Bailey (1874), 87 U.S. 520, 22, L. Ed. 376, 378, it is said:

> "A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability was coupled with the provision for a special remedy, that remedy and that alone, must be employed"

It is therefore important to settle the question whether the remedies expressed in the warranty stem from the Executive Order, are statutory in origin, and are exclusive.

3. If it should be decided by this Court that the right to annul the contract or to deduct the contingent fees does not exclude judicial remedies, it should nevertheless be settled by this Court whether the Government, invoking a judicial remedy, may resort to the contract remedy for the measure of its damages, namely, the amount of the contingent fees, or be restricted to the common law measure of damages recoverable under the judicial remedy, namely, the actual loss directly and naturally resulting in the ordinary course of events from the breach of the warranty.

The Court of Appeals, after ruling that the contract self-help remedy to deduct the commissions did not exclude a judicial remedy, expanded the self-help remedy as if it read "to deduct *or recover*", and thereby, under the guise of a judicial remedy, gave the

Government a remedy which was neither the contract self-help remedy nor a common law judicial remedy.

A subsidiary question involved, which should be determined by this Court, is whether the Court of Appeals has not, in actual effect, *reformed* the contract by granting to the Government a right to recover in the invoked judicial proceeding the amount of contingent fees as liquidated damages, and thereby added to the contract right "to deduct" the amount of contingent fees.

4. It should be settled by this Court whether, *in a fixed price contract* with the Government, *under which contingent fees are not deductible if payable to a qualified selling agency but are deductible if payable to a non-qualified selling agency*, the right to deduct from the contract price the amount of the contingent fees, or, as the Government contends, the right to recover such amount, gives rise to a claim for liquidated damages, or to a penalty not allowable under Section 57j of the Bankruptcy Act.

Prior to Executive Order No. 9001, it was against public policy to employ a person to secure a government contract upon a contingent fee basis. However, except in the case of collusion or fraud in which government officials participated, there was no right of action in the Government to make a money recovery against contractor no matter how evil the tendency of the employment might have been. Executive Order No. 9001 attempted to give the Government such a right, to be

exercisable under certain conditions and in a specified manner.

It is important to determine whether the right to deduct, under the circumstances attending the situations involved in the warranty against contingent fees, is directed toward compensating the Government against loss or, *in terrorem*, toward deterring the entering into agreements for securing government contracts. The Court of Appeals ruled in effect that it was compensatory. However, in the case of fixed-price contracts, could the question of a loss to the Government be involved, where the same price is agreed to be paid, whether the selling agency qualifies or does not qualify under the exceptive clause, and, more particularly, in the case of a sub-contract, where the warranty in the prime contract is not breached?

It is also important to settle this question because it affects the equitable distribution under the Bankruptcy Act which Section 57j seeks to accomplish.

Aside from the inhibitions of Section 57j of the Bankruptcy Act, the right to deduct as given in the warranty is unenforcable under the holding of this court in Priebe v. United States, 332 U.S. 407, 92 L. E. 32, and there is a probable conflict on this Federal question between such decision and the decision of the Court of Appeals herein.

5. It should be settled by this Court whether the Government, acting by those authorized to deal with

the contractors and who dealt with the contractors throughout, had the discretion to deduct or not to deduct the proscribed contingent fees.

Under the declared objective of the First War Powers Act of 1941 and of Executive Order No. 9001, promulgated pursuant thereto, looking to the successful prosecution of the War by the effective utilization of "resources and industries", the facilities of those dealing with the Government, whether prime contractors or subcontractors, were to be utilized in the manner which would best accomplish the desired objective. Thus, the Executive Order was directed to "an all out industrial mobilization . . . in order that the materials necessary to win the War may be produced in the shortest possible time".

The exigencies of the War period made it plain to Congress that it could not, by statute, precisely define the authority to be granted to the Executive Department. Therefore, broad flexible powers were granted to the President, who, in turn, in issuing his executive orders, was likewise unable narrowly to define the powers delegated by him to the various departments, and, of necessity, left to their broad discretion the manner and means of exercising the authority vested in them. With respect to the War Department, Executive Order No. 9001 vested in it equally broad authority, exercisable by the Secretary of War, and, in his discretion and by his direction, through any officer or civilian official of the War Department, to procure the "all out industrial mobilization". To this end

contracts and subcontracts, amendments, modifications, performance, termination, and other aspects thereof, were put on the broad basis of results rather than upon rigidity of application, and provided for the exercise of the sound discretion of those in the Government charged with entering into, regulation and performance of the contracts and subcontracts.

The public policy, holding improper the payment of contingent fees, was carried into the Executive Order, but it yielded to the needs of the emergency by permitting the employment of bona fide established agencies in the procurement of government contracts, and the exercise of discretion as to the payment of contractors who dealt with agencies on a contingent fee basis, even though such agencies were not strictly within the exceptive clause of the warranty.

Consequently, it is important to clarify and determine whether the clause in the warranty, "to annul, or in its discretion, to deduct", vested in the War Department a discretion *not to deduct*.

6. If the Government had the discretion *not to deduct* the proscribed contingent fees, it should be settled by this Court whether such discretion was exercised by the Government by not annulling the contract, by making payment in full of the contract price, and by not deducting therefrom the amount of the contingent fees, where the Government, throughout, had full knowledge, by those who acted for it in the entering into, supervision and performance of the contracts,

of the agreement between the contractor and the selling agency for the payment of contingent fees and of all payments thereunder.

The Court of Appeals, in its opinion, cited cases of voluntary payments, in which it was declared that the defense of voluntary payment is not good against the United States, cases where payments were made erroneously to one having no just right to the funds, cases where payments were made under misconstruction of the law, and cases where payments were made without warrant of law; but did not deal with the question as to whether, as found by the Referee, the Secretary of War had exercised a discretion not to deduct.

Therefore, it is important that it be settled whether, where the contractor has performed and the Government, with knowledge of all the facts, has paid the full contract price without deduction, the payment in full constitutes a proper exercise by the War Department of the discretion not to deduct, or whether, as held by the Court of Appeals, such payment may be recovered, to the amount of the contingent fees, either as a voluntary payment erroneously made, or as a payment made under a misconstruction of the law, or as a payment made without warrant of law.

Each of the questions presented as to contingent fees has been discussed as it arose in the instant case, but such questions have a much more general importance. The case at bar is not an isolated one, nor are

the questions herein presented peculiar to it. There are undoubtedly hundreds of like contractors who have fully performed under War contracts and who have been paid the full contract prices, without deduction, and who have been finally renegotiated. Under the decision of the Court of Appeals, sought to be reviewed, these contractors may nevertheless be called upon, without limitation as to time, to account for an asserted violative payment of contingent fees. Not only is it important that the contractors know of this lurking, latent liability, but it is equally important to the persons who extend credit to them. In each such situation there is the risk of impairment of the financial soundness of the contractor.

And, generally, in proceedings in bankruptcy, these very questions must be determined whenever the Government presents a claim for the amount of contingent fees.

The settlement by this Court of each of these questions is also important to the Government for the ascertainment of its rights. It should know when the warranty has been breached; whether the remedies provided are exclusive; whether the remedies are for liquidated damages or for a penalty; whether the Government has the discretion to deduct or not to deduct; and whether, if it has such discretion, the payment of the contract price in full constitutes an exercise of such discretion.

While not involved in the case at bar, the questions herein presented may arise under Section 153 of the

Armed Services Procurement Act of 1947 (Title 41 U. S. C. A., Sec. 151 et seq.). Section 153 of that Act has substantially adopted and incorporated the requirement of Executive Order No. 9001 with respect to the warranty against contingent fees. The settlement of the questions herein presented would apply equally to the warranty made part of contracts under the Procurement Act of 1947.

So far as our research has disclosed, the case at bar is the only case dealing with a claim of the Government asserting a right to recover from a contractor the amount of contingent fees paid in breach of the warranty. It may be regarded as a test case.

It is important, therefore, that all the questions presented herein should be settled by this Court.

## II

### (Renegotiation Claim)

The Government's claim for excessive profits under the Renegotiation Act raises several important unsettled questions of bankruptcy law.

7. It should be settled by this Court whether the bankruptcy court under the Bankruptcy Act, or the War Contracts Price Adjustment Board under the Renegotiation Act, has the exclusive jurisdiction to liquidate, as against a bankrupt estate, an unliquidated claim of the Government for excessive profits.

The Bankruptcy Act, as here relevant, provides -

Bankruptcy Act



"Sec. 2. Creation of Courts of Bankruptcy and Their Jurisdiction.

"a. The courts of the United States . . . as courts of bankruptcy . . . are hereby vested . . . with . . . such jurisdiction as will enable them to exercise original jurisdiction in proceedings under this Act, . . . to -

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;".

"Sec. 57. Proof and Allowance of Claims.

"d. Claims which have been duly proved shall be allowed . . . unless objection to their allowance shall be made by parties in interest . . .: Provided, however, That an unliquidated claim . . . shall not be allowed unless liquidated . . . in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation . . . or that such liquidation . . . would unduly delay the administration of the estate . . . ".

"Sec. 63. Debts Which May Be Proved.

"a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . .

"(4) . . . a contract express or implied;".

"d. Where any . . . unliquidated claim has been proved, but, as provided in subdivision d of Sec-

tion 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act."

The Renegotiation Act, Sec. 1191, as here relevant, provides:

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, . . . the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits . . . . If the Board does not make an agreement . . . , it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.".

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits . . . may, within ninety days . . . after the mailing of the notice of such order under subsection (c) (1), file a petition with

> The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . . , and such determination shall not be reviewed or redetermined by any court or agency. . . . A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . . ".

Thus, there are two Acts of Congress, each of which involves the question of jurisdiction with regard to provable claims allowable against a bankrupt estate. The Bankruptcy Act, by Section 2a(2), vests in the bankruptcy court the jurisdiction to allow or disallow claims against bankrupt estates. The jurisdiction to allow or disallow is exclusively in the bankruptcy court. In U. S. Fidelity and Guaranty Co. vs. Bray, 225 U. S. 205, 217, 56 L. Ed. 1055, 1062, this Court said:

> "We think it is a necessary conclusion that the jurisdiction of the bankruptcy courts in 'all proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance . . . of claims".

See also Pepper vs. Litton, 308 U. S. 295, 304, 84 L. Ed. 281, 288, and cases in notes 5, 7 in 1 Collier on Bankruptcy, 14th Ed., pages 147, 149.

The Renegotiation Act vests in the Board Jurisdiction to initiate renegotiation proceedings and, where agreement cannot be reached, to enter an order determining the amount, if any, of excessive profits. Absent a petition for the review and redetermination of such order by the Tax Court, the Board's order is made final and conclusive, and is not "subject to review or redetermination by any Court or other agency".

The Renegotiation Act does not specifically amend or modify the Bankruptcy Act, nor does it, by any express provision or otherwise, oust the jurisdiction of the bankruptcy court under Section 57d of the Bankruptcy Act to direct the manner and time within which an unliquidated claim shall be liquidated, to determine whether the unliquidated claim is capable of liquidation or can be liquidated without unduly delaying the administration of the estate, and to disallow such claims against the estate.

The Court of Appeals ruled, generally, that the determination of excessive profits was exclusively in the Board and the Tax Court, on proper review, and that the intervention of a petition in bankruptcy did not divest such jurisdiction.

The determination of the question vitally affects the proper application of the Bankruptcy Act and of the Renegotiation Act within their respective spheres. Referees in Bankruptcy, and the administrators of the Government charged with determining excessive profits of contractors, will be in doubt as to which Act governs. Therefore, where a renegotiation proceeding has

been initiated before, but not determined by the Board's order at the date of, the filing of the petition in bankruptcy, it should be settled by this Court whether the bankruptcy court may itself determine the claim on its merits, or whether the Board may nevertheless proceed to enter its order without securing the consent of the bankruptcy court.

8. Assuming, arguendo, that the jurisdiction to determine a claim for excessive profits is vested by the Renegotiation Act exclusively in the Board, and may be reviewed and determined only by the Tax Court, it should be settled whether the Government is not nevertheless required, by the provisions of Section 57d of the Bankruptcy Act, to apply to the bankruptcy court and obtain its consent to the determination by the Board, where such determination has not been made by the Board at the time of the filing of the petition in bankruptcy.

Section 57d of the Bankruptcy Act, above quoted in its relevant provisions, vests in the bankruptcy court the jurisdiction, which the bankruptcy court alone can and must exercise, to direct the manner and the time within which an unliquidated claim shall be liquidated and, further, to determine, for the purpose of allowing the claim, whether such unliquidated claim is capable of liquidation or such liquidation would unduly delay the administration of the estate.

Clearly, the objective of Section 57d is to insure an orderly, speedy and controlled administration of estates in bankruptcy.

It should, therefore, be settled by this Court whether a claim of the Government, based for its consideration upon an order entered by the Board after the filing of a petition in bankruptcy, without first obtaining from the bankruptcy court, pursuant to Section 57d, consent to the determination of the excessive profits in a pending renegotiation proceeding, is an allowable claim in the bankruptcy proceedings.

9. It should be settled by this Court whether Section 63a(5) of the Bankruptcy Act precludes a defense by a trustee in bankruptcy to a proof of claim on a judgment by default against the bankrupt, entered in another tribunal after the filing of the petition in bankruptcy, in a suit or proceeding upon an unliquidated claim provable under Section 63a(4) of the Bankruptcy Act, where the claimant did not obtain the consent of the bankruptcy court for its liquidation in such other tribunal, as provided for that purpose by Section 57d of the Bankruptcy Act, and thus, whether a judgment so obtained is to be deemed conclusive against the trustee in bankruptcy and the bankrupt estate.

The Bankruptcy Act, as here relevant, provides -

"Sec. 63. Debts Which May Be Proved. (U. S. C. A., Title 11, Sec. 10).

"a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . .

"(4) . . . a contract express . . . ;

"(5) provable debts reduced to judgments after the filing of the petition . . . ".

"Sec. 57. Proof and Allowance of Claims. (11 U.S.C.A., Sec. 93).

"d. Claims which have been duly proved shall be allowed . . . unless objection to their allowance shall be made by parties in interest . . . : Provided, however, That an unliquidated . . . claim shall not be allowed unless liquidated . . . in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation . . . or that such liquidation . . . would unduly delay the administration of the estate . . . ".

"Sec. 11. Suits By and Against Bankrupts. (11 U.S.C.A., Sec. 29).

"b. The court may order the . . . trustee to enter his appearance and defend any pending suit against the bankrupt.".

The Court of Appeals, in the case at bar, departed from the decisional law construing and interpreting the scope of Section 63a(5). It ruled, without qualification, that "debts of the bankrupt may be proved and allowed against his estate which are founded upon provable debts reduced to judgments after the filing of the petition in bankruptcy" and thus relied on the bare language of Section 63a(5), ignoring, however,

the related provisions of Sections 11d and 57d which restrict the scope of Section 63a(5).

A claim for excessive profits under the Renegotiation Act, until determined, is an unliquidated claim, provable upon a "contract express" under Section 63a(4). It is the type of provable claim which may be reduced to judgment after bankruptcy, as permitted by Section 63a(5). However, where, as here, an unliquidated claim is being liquidated, before the judgment thereon may become a provable claim under Section 63a(5), the consent of the bankruptcy court to such liquidation, under the mandate of Section 57d, must first be obtained.

In the Matter of Paramount Publix Corporation, (C. C. A., 2, 1936), 31 Am. B. R. (N. S.) 713, 714, 85 F. (2d) 42, the Court said:

> "... we take it as law that a judgment obtained after bankruptcy petition filed does not liquidate a claim for purposes of distribution. In re Brady Foundry Co. (C. C. A., 7th Cir.), 5 Am. B. R. (N. S.) 602, 3 F. (2d) 437; In re Barrett & Co. (D. C., Ga.), 12 Am. B. R. (N. S.) 157, 27F. (2d) 159, affirmed (C. C. A., 5th Cir.), 29 F. (2d) 737; In re Hoey, Tilden & Co. (D. C.), 292 F. 269; In re Service Appliance Co. (D. C., N. Y.), 15 Am. B. R. (N. S.) 478, 39 F. (2d) 632; In re Kenwood Storage & Warehouse Corporation (D. C., N. Y.), 27 Am. B. R. (N. S.) 373, 4 F. Supp. 561. The fact that Section 63b, Bankr. Act (11 U. S. C. A., Sec. 103b), allows unliquidated claims to be liquidated 'in such a manner as it' (the court) 'may direct,'

would seem to give it control over liquidation. See, also, section 11 and section 57d (11 U. S. C. A., Secs. 29, 93d).

The claim at bar for excessive profits was allowed by the Court of Appeals, even though it was reduced to an order by an administrative agency (Board) after the filing of the petition in bankruptcy and without the consent or direction of the bankruptcy court for its liquidation. It is not an isolated case. The question involved is of every-day occurrence in the administration of bankruptcy law. The departure by the Court of Appeals from the weight of authority in the decisional law, with the resulting doubt created thereby, needs an authoritative settlement in the interest of a uniform, orderly and speedy administration of bankruptcy cases, and, equally, in the interest of the Government for its guidance in the renegotiation of claims for excessive profits in situations, attended by circumstances, as presented by the case at bar.

It is, therefore, of considerable importance that, for the reasons above outlined, the questions presented under the "Renegotiation Claim" should be definitively settled by this Court.

WHEREFORE, petitioner prays that this petition for a writ of certiorari be granted, and that a writ of certiorari be issued out of this Honorable Court to the United States Court of Appeals for the Fifth Circuit for a review of its decision and judgment entered in cause No. 12738 on December 9, 1949, with petition for rehearing denied February 18, 1950; and that

the judgment of said court be reversed, and your petitioner prays for such other relief as may be proper.

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## Appendix A

(Contingent Fee Claim)

### FIRST WAR POWERS ACT, 1941
(55 Stat. 838, 50 U.S.C.A. App. 601)

### TITLE I—COORDINATION OF EXECUTIVE BUREAUS IN THE INTEREST OF THE MORE EFFICIENT CONCENTRATION OF THE GOVERNMENT

§601. Coordination of executive bureaus, offices, etc., by President for national defense and to prosecute the war; issuance of regulations

For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title [sections 601-605 of this Appendix], and to this end is authorized to make such regulations and to is-

sue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 [sections 301-310, 311-314 of Title 44]: *Provided*, That the termination of this title [sections 601-605 of this Appendix], shall not affect any act done or any right or obligation accruing or accrued pursuant to this title [sections 601-605 of this Appendix] and during the time that this title [sections 601-605 of this Appendix], in in force: *Provided further*, That the authority by this title [sections 601-605 of this Appendix], granted shall be exercised only in matters relating to the conduct of the present war: *Provided further*, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions. Dec. 18, 1941, c. 593, Title I, § 1, 55 Stat. 838.

## TITLE II—CONTRACTS

§611. War contracts exempt from certain restrictions upon authorization by President

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating

to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest. Dec. 18, 1941, c. 593, Title II, § 201, 55 Stat. 839.

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## EXECUTIVE ORDER NO. 9001

Dec. 27, 1941, 6 F.R. 6787, as amended Ex. Ord. No. 9296, Jan. 30, 1943, 8 F. R. 1429, eff. as of Dec. 27, 1941

### WAR AND NAVY DEPARTMENTS AND MARITIME COMMISSION EXERCISE OF CERTAIN FUNCTIONS AND POWERS

The successful prosecution of the war requires an all-out industrial mobilization of the United States in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of War and the Navy and the United States Maritime

Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all the industrial resources of the Country. It is expected that in the exercise of the powers hereinafter granted, these Agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of the war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy production; the development and use of subcontracting to the fullest extent and the conservation of strategic materials.

## TITLE I

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort", approved December 18, 1941, (hereinafter called "the Act") [sections 601 et seq. of Appendix to Title 50] and as President of the United States and Commander-In-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts hertofore or hereafter made, and to make advance, progress, and other payments there-

on, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

4. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required.

## TITLE II

5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

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Armed Services Procurement Act of 1947
(41 U.S.C.A. § 151)

"Every contract negotiated pursuant to section 302 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee."

Bankruptcy Act §57j
(11 U.S.C.A. §93(j))

§57(j) Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

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**Appendix B**
(Renegotiation claim)

Bankruptcy Act
(11 U.S.C.A.)

"Sec. 2. Creation of Courts of Bankruptcy and Their Jurisdiction. (11 U.S.C.A., § 11).

"a. The courts of the United States . . . as courts of bankruptcy . . . are hereby vested . . . with . . . such jurisdiction as will enable them to exercise original jurisdiction in proceedings under this Act, . . . to -

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;".

* * * *

"Sec. 11. Suits By and Against Bankrupts. (11 U.S.C.A., § 29).

"b. The court may order the . . . trustee to enter his appearance and defend any pending suit against the bankrupt."

"Sec. 57. Proof and Allowance of Claims. (11 U.S.C.A., § 93(d)).

"d. Claims which have been duly proved shall be allowed . . . unless objection to their allowance shall be made by parties in interest . . . : Provided, however, That an unliquidated claim . . . shall not be allowed unless liquidated . . . in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation . . . or that such liquidation . . . would unduly delay the administration of the estate . . .".

"Sec. 63. Debts Which May Be Proved. (11 U. S.C.A., § 103).

"a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . .

"(4) . . . a contract express or implied;".

"d. Where any . . . unliquidated claim has been proved, but, as provided in subdivision "d" of Section 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act."

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Renegotiation Act
(50 U.S.C.A. App. §1191(c) )

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts

with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, . . . the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits . . . If the Board does not make an agreement . . . , it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.

"(c) (2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reduction in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the con-

tractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive prifits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive prifits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive prifits actually paid to him and not withheld or eliminated by some other method under this subsection."

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessiv eprofits . . . may, within ninety days . . . after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . . , and such determination shall not be reviewed or redetermined by any court or agency. . . . A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . .".

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1949

NO. ———

BURTON B. PADDOCK, Trustee in Bankruptcy of the Estate of GLOBE AIRCRAFT CORPORATION, Bankrupt,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### STATEMENT

The facts have been sufficiently stated in the petition for writ of certiorari.

### ARGUMENT

1.

Contingent Fee Claim

Executive Order 9001 was equivalent to a statutory enactment. Hughes v. Dupont, 37 F. 2d 725.

Under the mandate of the Executive Order, all contracts for the procurement of war materials after December 18, 1941, included the warranty against contingent fees.

We know of no instance during the course of the war where, on account of a breach of the warranty against contingent fees, the War Department, Navy Department or Maritime Commission either annnuled a contract or deducted the amount of the commissions due thereunder. This indicates that with reference to contractors who used the services of selling agencies on contingent fees, the War Department, Navy Department and Maritime Commission were of the opinion that the particular agencies came within the exceptive clause of the warranty, or that such Departments exercised a discretion to not make the deduction under the belief that such actions best forwarded the successful prosecution of the war.

The program for procurement of materials during the war was successfully carried out. With reference to the cost of such procurement, the Government protected itself against excessive charges under its renegotiation procedures.

The question is, having during the war failed to annul a particular contract or make any deduction therefrom, can the Government now re-inquire as to whether the selling agency which the contractor used came within the approved category, and dependent upon its conclusion, can the Government now recover

from such a contractor the amount of the commissions which the contractor has therefore paid to such a selling agnecy?

This general question resolves itself into the six specific questions set forth in the petition for certiorari (pp. 11-14 supra).

*First:* What kind of a selling or commercial agency comes within the approved class?

Does the approval extend to an agent and employee in the ordinary sense, and also to the independent selling agency which represents more than one contractor and deals generally with prospective purchasers? The Judge Advocate General so ruled (Footnote - *Reynolds* v. *Goodwin Hill*, 154 F. 2d 553).

Should the distinction between approved and unapproved agencies depend upon whether the particular agency has been employed to drum up business generally and not for the purpose of obtaining one specific contract? The Second Circuit so held in the Reynolds case just above mentioned, and in *Bradley* v. *American Radiator Corp.*, 159 F. 2d 39.

Where a contractor had no regular commercial or selling agency, and engaged the services of his independent insurance agent to assist in procuring war contracts, did such independent agency come within the exceptive clause? The Missouri Supreme Court held that he did in *Ebeling* v. *Swaime Mfg. Co.*, 209 S.W. 2d 892.

In suits by an agent to collect contingent fees from the contractor, where the defense was offered that Executive Order 9001 was violated, the courts have disallowed the defense. See *Bradford* v. *Durkee Marine Products Corp.*, 40 N.Y.S. 2d 448; *Leahy* v. *Terminal Corp.*, 69 N.Y.S. 2d 596.

Do the terms "commercial or selling agencies" exclude the salaried employee. Contrawise, does the term "maintained by the contractor for the purpose of securing business" exclude the independent commercial agency representing more than one contractor which is engaged on a contingent fee basis only?

The Court of Appeals for the Fifth Circuit held that the word "maintained," as a matter of law and regardless of what might have been the findings of the Referee and the District Court, meant that the agency, in order to come within the exceptive clause, must have been supported by the contractor in some manner other than and in addition to the payment of contingent fees, and also that the relationship between the contractor and such agency must have been in existence prior to the time that the agent was instructed to render the procurement services in question. This construction is at variance with all such previous interpretations.

The Armed Services Procurement Act of 1947, which controls in current contracts, requires a warranty substantially the same as that required by Executive Order 9001 (41 USCA, Sec. 153).

It is important not only to contractors who may at this late date be called on by the Government to remit for the amount of contingent fees paid by such contractors many years ago, but also to contractors now dealing with the Government, as well as the legitimate selling agencies serving such contractors, to know with certainty what kind of an agency came and now comes within the exceptive clause of the mandatory warranty against contingent fees.

*Second;* Is the discretionary right to deduct, a right created solely by Executive Order 9001, and therefore exclusive?

Even though certain decisions of this Supreme Court held that contracts to pay contingent fees for the procurement of Government work were unenforceable as between the agent and the contractor (*Providence tool Co.* v. *Morris*, 69 U.S. 45, 17 L.E. 868; *Hazelton* v. *Sheckles*, 202 U.S. 71, 50 L.E. 939), there had been no decisional law, as of date of Executive Order 9001, that recognized in the Government the right to recover from such a contractor a sum of money equal to the amount of the contingent fees which the contractor had agreed to pay the agent. And as of the effective date of Executive Order 9001, there were no statutes in effect granting to the Government the right to make such a recovery against a contractor.

The Executive Order was issued pursuant to a statute, First War Powers Act, and the Executive Order mandatorily required that the warranty be included in all war procurement contracts.

The Executive Order provided specific remedies which the Government might exercise in the event of the breach.

This being creative legislature, providing its own remedies, the same were exclusive. *Pollard* v. *Bailey*, 87 U.S. 520, 22 L.E. 376.

The discretionary right to deduct, as provided in the Executive Order warranty, was necessarily exercisable at the time of or prior to final payment by the Government to the contractor. Likewise, the annulment of the contract had to be exercised during the performance period. The remedial parts of the Executive Order, in effect, provided a period of limitations for the exercise thereof, and it was necessary that the Government exercise the remedies in the time and manner as provided. *Ewing* v. *Risher*, 176 F. 2d 641.

Had it been intended that the Government, in addition to its discretionary right to deduct, should, after payment, have the additional right to make an affirmative recovery of the contractor, the Executive Order would have so provided. By comparison, see the Renegotiation Act (50 USCA, App., Sec. 1191(c)(2) ) wherein the Government is granted the right to eliminate excessive profits by reduction and withholding, but is also granted the specific right to eliminate the profits "by recovery from the contractor, through repayment, credit, or suit, etc."

*Third;* If the Government has a remedy by contract, on account of breach of warranty, is its recovery limited to the actual loss sustained?

The point should first be made that if the argument of the Court of Appeals for the Fifth Circuit is recognized that the remedies of the Government, upon breach of the warranty, were contractual, the problem as to exclusive remedies is by no means settled. Where a warranty provides specifically for the remedy, upon breach, and where the remedy is adequate, the same is exclusive. *Permutit Co.* v. *Massasoit Mfg. Co.*, 61 F. 2d 529.

Can it be said that the warranty as contained in war contracts, was an agreement between the Government and the contractor for the payment of liquidated damages in the amount of the commissions which the contractor had theretofore paid a selling agency? The language of the warranty does not allow for such a construction. When it is recalled that all war contracts, printed forms, which were used during the war, contained an express provision for liquidated damages in event of delay, as well as the warranty against contingent fees, it seems unanswerable that had it been intended by the Government and contractor to make an agreement for liquidated damages upon breach of the contingent fee warranty, they would have drawn and inserted a liquidated damage clause in usual and unambigous terminology.

Had it been the intention of the Government to provide for liquidated damages upon breach, it should

have included a specific agreement to that effect. It can not be expected that the court will rewrite the contract for the parties. *U. S.* v. *American Surety Co.*, 322 U.S. 96; 88 L. E. 1158.

*Fourth;* Is the right to deduct the amount of the contingent fees a penalty? The Government, in its procurement program during the war, was in a position to sustain pecuniary damages through excessive charges by the contractor and through defective material. The usage by the contractor of the non-approved agency as distinguished from the approved agency, could not have contributed to either of such loss possibilities. In its original opinion, the Court of Appeals for the Fifth Circuit sought to uphold its decision by making the assumption that the contractor paying a contingent fee will increase the price of his bid to the Government by the amount thereof. (R. 535). It being pointed out in the Petition for Rehearing that the assumption was not only contrary to the record, but that the same was unjustifiable in that the contractor using an approved agency would by the same token increase the amount of his bid to the Government, the Court of Appeals withdrew that portion of its opinion (R. 583).

It is difficult to see how the Government thought that it would, or in fact did, either save money in its procurement program or obtain better materials, where the contractor used the approved type of agency rather than the unapproved type. This demonstrates that the warranty was designed as a deterrant—it was not in-

tended to provide a reasonable measure for the damages which the Government anticipated that it would sustain in event of a breach. This being so, the right of deduction is unenforceable under the ruling of this court in *Priebe & Sons* v. *U. S.*, 332 U.S. 407, 92 L.E. 32. Without reference to the Priebe decision, the claim was not allowable in bankruptcy under the specific provisions of Section 57(j) (93 USCA, Sec. 93(j) ).

*Fifth:* Did the War Department, during the progress of the war, have the right to deduct or not to deduct?

The Executive Order warranty itself provided that the right of deduction was in the Government's discretion.

Section 3 of Title 1 of Executive Order 9001 provided specifically that the War Department, Navy Department and Maritime Commission might release accrued obligations, including accrued liquidated damages.

A reading of the Executive Order and of the First War Powers Act shows very clearly the intention to vest in the War Department, Navy Department and Maritime Commission the unlimited and unreviewable authorization to make decisions as to modification of the contracts and as to settlement of claims, including release of liquidated damages, during the progress of the performance of the contract, with the sole objective in so doing of furthering the successful prosecution of the war. It should be determined whether

the words "in its discretion" meant just that, or whether the same meant nothing, as held by the Court of Appeals.

*Sixth:* Did payment by the Government to the contractor constitute an exercise of a discretion not to deduct?

Where the Government, at the time of the execution of the contract and continuously during the performance thereof, had knowledge of all facts as to contractor's arrangement with a particular selling agency on a contingent fee basis, and where the contractor faithfully performed his contract and was paid in full by the Government, can it be said that the payment was illegally made? Isn't the contrary conclusively shown by such facts, namely that the payments were properly made in the exercise of discretions specifically vested.

It is important that an authoritative decision be made as to whether payments under such circumstances are properly made and not recoverable under the principle of law announced in U. S. v. Great Northern Ry., 287 U.S. 144; 77 L.E. 223, or whether the same constitute illegal payments under the principle announced in U. S. v. Wurts, 303 U.S. 414; 82 L.E. 932.

## II.

## Renegotiation Claim

Prior to the filing of the petition in bankruptcy against Globe, renegotiation proceedings had been in-

stituted against Globe by the War Contracts Price Adjustment Board.[1] At this time, there was no definite or liquidated sum claimed to be owing by Globe for alleged excessive profits. After the filing of the petition in bankruptcy, the War Contracts Price Adjustment Board, by its order of April 4, 1947, found that Globe earned $200,000.00 in excessive profits for 1945, and was, accordingly, indebted to the United States for such amount.[2] The Referee in Bankruptcy, affirmed by the District Court, found that Globe earned no excessive profits for 1945. Thus, two fact-finding tribunals reached opposite conclusions as to whether Globe had, in truth and in fact, earned excessive profits during 1945 from Government contracts.

The Referee (R. 470-471) held that the proceedings of the War Contracts Price Adjustment Board were conducted without the knowledge and consent of the

[1]This in itself is extremely doubtful. 50 U.S.C. App. Sec. 1191(a)(1) requires that the notice initiating the renegotiation proceeding shall give to the contractor "reasonable notice of the time and place of a conference to be held with respect thereto." The notice in this case stated that, "It is not necessary to hold any conference with your company for purposes of instituting renegotiation." (R. 463) Under such circumstances, failure strictly to comply with the jurisdictional statute would seem to render the entire proceedings based thereon null and void and of no force or effect.

[2]This order was entered without prior notice to the Trustee in Bankruptcy and in face of the fact that the Board knew of the bankruptcy and knew that "the contractor is unable at the present time to enter into any agreement by reason of bankruptcy proceedings instituted on December 31, 1946 before the United States District Court for the Northern District of Texas, Fort Worth Division, Case No. 2153 in Bankruptcy." See "Special Report of Impasse with Globe Aircraft Corporation" dated January 21, 1947 (R. 415, 416-420).

Bankruptcy Court and without participation by the Referee under proper directions of said Court, and that the proceedings and order of such Board interfered with the orderly administration of the bankrupt estate; were a nullity; and in no manner binding on the estate and the Bankruptcy Court. The District Court, in affirming the Referee, held:

> "It would be a strange thing if a creditor could come into the Bankruptcy Court after the appointment of a Trustee, file a claim and secure its allowance based on proceedings elsewhere before any Board or any Court, held during the bankruptcy in this Court, and before the appointment of a trustee, who, of necessity, had no opportunity to be heard in such proceedings." (R. 507)

The Court of Appeals reversed. In its first opinion, it held that the Trustee in Bankruptcy could have participated in the renegotiation proceedings but failed to do so, and having failed to do so, was "precluded under the terms of the renegotiation Act from asserting any defense to said claim. U.S. Code, Title 50, App. Sec. 1191(c)(1) and (2) and (d)(1)." On rehearing, the Court of Appeals shifted its ground for reversing the District Court. In its opinion denying the petition for rehearing, the Court resorted to the Bankruptcy Act itself and held that under Section 63(a)(5) (11 U.S.C.A. §103(a)(5) ), a provable debt could be reduced to judgment after the filing of the petition and before the application for discharge by the bankrupt, by any other court or administrative tribunal without the consent or direction of the Bankruptcy Court,

and that such judgment so obtained was conclusive against the trustee of the bankruptcy estate. The Court did not even mention §57(d) (11 U.S.C.A., Sec. 93 (d),) which provides:

> "That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the Court, and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation of such liquidation would unduly delay the administration of the estate or any proceeding under this title."

Nor did it mention Section 57n of the Bankruptcy Act (11 U.S.C.A., §93(n) ) specifically providing that "all claims provable under this Act, including all claims of the United States, shall be proved and filed in the manner provided by this Section."

The Referee found that there were no pleadings to authorize the Bankruptcy Court either to estimate the amount of the claim or to prescribe a manner for the liquidation; and that if there were any available procedure for the liquidation of the claim for refund of excess profits, the orderly administration of the estate would be unduly delayed thereby. (R. 472).

The Court of Appeals, by its two opinions, thus decided three separate and distinct questions, which are of great public importance and command authorita-

tive disposition by this Honorable Court. These are the questions set forth at pages 14 and 15 hereof as Numbers 7, 8 and 9.

*Seventh;* Whether the Bankruptcy Court or the War Contracts Price Adjustment Board has exclusive jurisdiction?

The answer to this question involves the construction of two Congressional Acts of vital importance to the public welfare: the Bankruptcy Act and the Renegotiation Act. This Court held, in *Straton* v. *New*, 283 U.S. 318, 75 L.E. 1060.

> "The purpose of the Bankruptcy Act (11 U. S. C. A.) passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. Acme Hardware Co. v. Beekman Lumber Co., 222 U.S. 300, 32 S. Ct. 96, 56 L. Ed. 208. It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the district court having acquired the exclusive right to administer all property in the bankrupt's possession."

Again, in *People of State of New York* v. *Irving Trust Co.*, 288 U.S. 329, 77 L.E. 815, the Supreme Court quoted from an earlier decision the following rule:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among other, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them. * * * A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy."

See also *Pepper* v. *Litton*, 308 U.S. 295, 84 L. Ed. 281; 1 Collier on Bankruptcy, 14th Ed. 147, 149.

These principles are well established and of long duration.

On the other hand, this Court, in *Lichter* v. *United States*, 334 U.S. 742, 92 L.E. 1694, held the Renegotiation Act to be constitutional and the remedies provided therein to afford due process. The Act specifically provides that the order of the War Contracts

Price Adjustment Board, if no petition to the Tax Court therefrom is filed, "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency."

There is thus an apparent fundamental conflict in jurisdiction in the case of a pending claim for excessive profits under the Renegotiation Act against a contractor against whom a petition in bankruptcy has been filed prior to the time the renegotiation claim is determined and liquidated. The unliquidated claim for excessive profits under the Renegotiation Act has to be disposed of. Which tribunal—the War Contracts Price Adjustment Board or the Bankruptcy Court—has the jurisdiction to do it? The Referee and the District Court held that the exclusive jurisdiction in such case resided in the Bankruptcy Court. The Court of Appeals held it was in the War Contracts Price Adjustment Board. There is thus presented an important question of Federal law that has not been, but should be, settled by this Honorable Court.

*Eighth;* Was it necessary, under Section 57d, that the Government apply to the Bankruptcy Court and obtain its consent to have the amount of excessive profits, if any, determined by the War Contracts Price Adjustment Board?

Section 57 of the Bankruptcy Act provides for the allowance of claims in bankruptcy. Its requirements are mandatory. Part "d" of said section provides the method under which unliquidated claims may be liquidated and allowed. In this connection, Section 11b (11 USCA, Sec. 29(b)) authorizes the Bankruptcy

Court to permit its Trustee to defend pending non-bankruptcy suits and proceedings.

The objective of Section 57d is to give to the Referee a control over the administration of the estate in bankruptcy. (3 Collier on Bankruptcy, 14th Ed., 184, 195, 202-209). Whether renegotiation proceedings can be conducted and determined, without the Bankruptcy Court's being informed thereof and without its giving consent thereto, is an important question which should be authoritatively determined.

*Ninth;* Where an unliquidated claim is, after the filing of bankruptcy proceedings, reduced to judgment in another court, without the consent of the Bankruptcy Court, is the judgment conclusive and allowable?

The answer to this question involves a reconciliation of tow apparently conflicting sections of the Bankruptcy Act itself. Bankruptcy procedure is of fundamental public importance. The framers of the Constitution specifically authorized Congress to establish a uniform system of bankruptcy throughout the United States. Article I, Sec. 8, Clause 4 of the *Constitution.* The latest comprehensive bankruptcy act so passed by Congress was the Chandler Act enacted in 1938. The question raised by the decision of the Court of Appeals is whether a creditor who has brought an action in another tribunal to reduce an unliquidated claim to judgment, which suit is pending at the time of the petition in bankruptcy, may proceed with such action without the consent or direction of the Bankruptcy Court, reduce the unliquidated claim to judgment, and thereby conclusively establish a provable and allowable debt

against the bankrupt estate. The Court of Appeals held that that could be done under the terms of Section 63(a)(5) (11 U.S.C.A., Sec. 103 (a)(5),) reading as follows:

"Sec. 103. Debts provable against

"(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon

"* * * *

"(5) Provable debts reduced to judgments after the filing of the petition and before the consolidation of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; * * * ."

Section 63(b) (11 U.S.C.A., Section 103(b) ) provides:

"Where any contingent or unliquidated claim has been proved, but, as provided in subdivision d of Section 93 of this title, has not been allowed, such claim shall not be deemed provable under this title."

Section 57(d) (11 U.S.C.A., Section 93(d) ) provides:

"(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unli-

quidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title."

The Court of Appeals, without even mentioning or considering Sections 63(d) or 57(d) above, held that Section 63(a)(5) required the allowance of an unliquidated claim reduced to judgment in another tribunal pending bankruptcy, even though it was so reduced to judgment without the consent or direction of the Bankruptcy Court. In so doing, it allegedly distinguished, but in fact overruled, its own earlier decision on this subject. *In re Barrett & Co.*, 27 F. 2d 159, aff'd 29 F. 2d 737. This holding is further directly contrary, not only to the statutory provisions above, but to the holding of the Second Circuit Court of Appeals in *In re Paramount Publix Corporation*, 85 F. 2d 42, wherein the Court stated, at page 43:

> " * * * we take it as law that a judgment obtained after bankruptcy petition filed does not liquidate a claim for purposes of distribution. (Cases cited.) The fact that section 63b, Bankr. Act (11 U.S.C.A. Sec. 103(b) ), allows unliquidated claims to be liquidated 'in such manner as it (the court) may direct,' would seem to give it control over liquidation. See, also, Section 11 and Section 57(d) (U.S.C.A., Secs. 29, 93(d) )."

See also 1 Collier on Bankruptcy, 14th Ed. 1170, 1171 and 3 Collier ab. cit., 1871-1872, 1874 and cases cited therein.

The importance of an authoritative disposition of this question cannot be overemphasized. Uniform, orderly and speedy disposition of bankruptcy cases is of national concern. The decision below introduces into bankruptcy procedure a method for creditors to obtain binding judgments in other tribunals against the bankrupt estate not contemplated or authorized by Congress. Unless clarified by the final say of this Honorable Court, chaos in the administration of the Bankruptcy Act will result in such cases. This is no isolated case. This question arises every day in the administration of bankruptcy law, and the uncertainty created by the decision below requires the attention of this Court to the end that final, authoritative disposition is made of this vital question.

It is respectfully submitted that the writ of certiorari should be granted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 79

BURTON B. PADDOCK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GLOBE AIRCRAFT CORPORATION, BANKRUPT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The order of the referee in bankruptcy and the opinion of the District Court for the Northern District of Texas (R. 467–473; 506–508) are not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 527–536) is reported at 178 F. 2d 394. Its opinion on rehearing (R. 575–578) is reported at 180 F. 2d 121.

### JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 22, 1949

(R. 536–537). A petition for rehearing was denied on February 18, 1950 (R. 578). The petition for a writ of certiorari was filed on May 18, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether the United States, in a bankruptcy proceeding, may assert claims for

(1) the amount of contingent commissions paid by the bankrupt for Government contracts in violation of the contracts' standard Covenant Against Contingent Fees, and

(2) the amount of excessive profits determined in an order of the War Contracts Price Adjustment Board under the Renegotiation Act, where renegotiation proceedings had been instituted prior to the date of filing of the petition in bankruptcy, but the order was issued subsequent to that date.

## STATUTES AND CONTRACT PROVISIONS INVOLVED

1. The pertinent provisions of Sections 57 and 63 of the Bankruptcy Act (11 U. S. C. 93, 103) are set forth in the Appendix, *infra*, pp. 23–24.

2. The pertinent provisions of the Second Renegotiation Act (Act of February 25, 1944, Title VII, 58 Stat. 21, 78–92, 50 U. S. C. App. 1191) are set forth in the Appendix, *infra*, pp. 24–27.

3. The standard Covenant Against Contingent Fees is set forth in the Statement, *infra*, p. 4.

## STATEMENT

This action arises from the filing by the United States of a proof of claim in the bankruptcy proceedings of Globe Aircraft Corporation (Globe) (R. 3). Included in that proof of claim was a claim for $383,527.47, designated as the "Contingent Fee Claim," and one for $200,000, designated as the "Renegotiation Claim" (R. 3, 9, 13).

1. *Contingent Fee Claim.*—Prior to World War II, Globe's airplane sales were made through 45 regular distributors and 350 authorized dealers (R. 201, 389). Instead of using these regularly-established channels of distribution in selling to the Government during the war, Globe, in late 1941 and early 1942, hired Production Engineering Company (Production) for the purpose of assisting it in making "approaches * * * to the representatives of the Government in order to get contracts" (R. 88–95, 212, 213). Through Production, Globe obtained various Army airplane contracts and subcontracts, amounting to more than twenty-five million dollars.[1] Each of

[1] Contract No. W535 AC–24980, for 600 AT–10 training planes and spare parts, amounted to $21,979,525.04 (R. 166, 198, 207, 353, 365); Contract No. W33–038 AC–603 was for $2,620,195.19 (R. 367–369); Contract No. W33–038 AC–2915, for $469,098.29 (R. 371); and subcontract under prime contract W535 AC–24581, for $658,946.90 (R. 373). Several smaller war contracts were also made with Globe (R. 9).

these contracts, in accordance with the requirements of Executive Order 9001 (6 F. R. 6787, 6788), contained the following "Covenant Against Contingent Fees" (R. 8, 229, 528):

> Covenant Against Contingent Fees.—The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Despite the express terms of this warranty, Globe agreed to pay Production a 1½% contingent commission on all such business secured by Production for Globe from the United States "until the conclusion of" World War II (R. 92, 93, 96, 206).

Production had been originally incorporated in 1939 as the American Equities Corporation and its business was "buying assets of defunct banks" (R. 321, 322). It assumed its present name in 1941, and still later started to describe its business

as "Production Engineers and Sales Representatives" (R. 323–324). No evidence was introduced to show how Production's experience in bank-asset buying equipped it to represent airplane manufacturers in procuring contracts. It was shown, however, that Production maintained Washington offices (R. 207), that all of its commissions from Globe were "exclusive[ly] for services rendered in the procuring of contracts" (R. 191),[2] and that Globe recognized that its payments to Production on this government business were "payments * * * not in the ordinary course of [Globe's] business" (R. 262, 389).

Globe, before entering the first Government contract[3] secured for it by Production, apprised the Army procurement officers of its contingent fee arrangement with Production (R. 176, 178). In investigating this arrangement to determine whether it violated the covenant against contingent fees, Army Procurement and the Air Technical Service Command, at various times in 1943 to 1945, requested and obtained detailed information from Globe concerning its operations under

[2] This statement was made by Globe's president in answering a question of the lawyer for the trustee in bankruptcy as to whether the payments to Production "were in part for services rendered." The answer, quoted in the text, was objected to by the Government attorney on the ground that the contract between Globe and Production constituted the best evidence. The referee sustained the objection. (R. 191.)

[3] This was Contract No. W535 AC–24980, amounting to over 21 million dollars. See footnote 1, *supra*, p. 3.

the arrangement (R. 85; 55; 50–54; 47; 43; 33). On September 4, 1945, upon termination of the investigation, the Acting Judge Advocate of the Air Technical Service Command ruled that the contingent commission paid by Globe to Production violated the covenant (R. 22). On October 9, 1945, formal demand was made upon Globe for $380,000,[4] representing the amount of the commission payments to Production (R. 82). Globe did not dispute the amount claimed (R. 101, 190, 230–231), but refused payment on the ground that Production was a bona fide established commercial or selling agency within the express exception to the covenant (R. 74).

In the meantime, and while the Army investigation undertaken by the procurement and service comraand officers was in progress, the Army disbursing officers made full payment of over twenty-five million dollars to Globe on its various contracts. See footnote 1, *supra,* p. 3. This sum was paid to Globe by various Government checks issued between 1942 and 1945, the last check to Globe being dated May, 1945 (R. 369), four months before the investigation had been completed. During that same month, Globe and

[4] This figure failed to take into account the sum of $3,527.47, which represented commissions paid to Production in 1942 and 1943 (R. 230–231). This additional sum makes up the difference between the $380,000 claim asserted by the Army and the $383,527.47 figure listed by the Government in its proof of claim (R. 9).

Production agreed to cancel their contingent commission arrangement (R. 215).

2. *Renegotiation Claim.*—On December 12, 1945, Globe's 1945 sales to the Government were assigned to the Wichita Price Adjustment Section of the Army Air Forces for renegotiation (R. 287, 399). Preliminary negotiations were held with Globe, which furnished the information necessary under the Renegotiation Act (R. 289–291, 298, 417, 484), and on October 24, 1946, Globe's representatives met with those of the War Contracts Price Adjustment Board (R. 421). The Board proposed that Globe refund $200,000 to the Government and an agreement to refund that amount was mailed to Globe but not executed by it (R. 399, 415). Notice constituting statutory commencement of renegotiation proceedings was then sent to Globe by registered mail on November 18, 1946 (R. 399, 463).

About 5 weeks later, on December 27, 1946, an involuntary petition in bankruptcy was filed against Globe in the District Court of the United States for the Northern District of Texas (R. 470; Pet. 3). A few days later Globe filed in the same court a petition for reorganization under Chapter X of the Bankruptcy Act, and trustees in reorganization were appointed (R. 399; Pet. 3). On February 28, 1947, attorneys for the trustees in reorganization informed the War Contracts Price Adjustment Board that while the President

of Globe and the trustees had "no objection to the amount of the proposed renegotiation refund" they could not then sign a renegotiation agreement (R. 400).

The Board, realizing that an agreement could not be reached, entered an order determining that Globe, during 1945, had derived excessive profits of $200,000, the amount of the previously proposed refund (R. 392–395). Notice of this order was mailed to Globe on April 4, 1947 by registered mail (R. 394–397), and formal demand for the repayment of "excessive profits in the amount of $200,000" less appropriate tax credits,[5] was made on Globe on the same date (R. 397).[6] On April 21, 1947, the petition for reorganization was dismissed and subsequently, in the reinstated bankruptcy proceedings, Globe was adjudicated bankrupt and petitioner here was appointed trustee in bankruptcy (Pet. 3).

3. *Proceedings With Respect to the Proof of Claim.*—Both the Contingent Fee and Renegotiation Claims were included by the Government in a proof of claim it filed in the reinstated bankruptcy proceedings. Petitioner (the trustee in bankruptcy) objected to the claims (R. 125),

[5] Petitioner claims that the appropriate tax credit is $171,000, leaving a balance of $29,000 (R. 139, 141). The court below left "open * * * such other claims, counterclaims, and set-offs, as either party may have against the other" (R. 578).

[6] No petition for redetermination of those excessive profits was ever filed in the Tax Court (R. 535).

and, after a hearing, the referee ordered both claims disallowed (R. 467–473). His order was affirmed by the district court, which held the Contingent Fee Claim invalid on the ground that Production was a "bona fide established commercial or selling agenc[y] maintained by the Contractor" within the exception to the Covenant Against Contingent Fees (R. 507). It also ruled the Renegotiation Claim was invalid because the War Contracts Price Adjustment Board order, setting forth the amount of excessive profits, was issued on April 4, 1947, more than 3 months after the involuntary petition in bankruptcy was filed against Globe[7] (R. 507).

On appeal, the court below reversed the district court judgment and allowed both claims (R. 536; 578). It ruled that Production was not a bona fide established commercial or selling agency maintained by the contractor, that the covenant was therefore violated, and that the United States could, in Globe's bankruptcy proceeding, assert a claim for the amount of the commissions paid by Globe in violation of the covenant (R. 527–534). It also allowed the Government to assert the Renegotiation Claim, holding that the War Contracts Price Adjustment Board's authority to determine excessive profits under the Renegotiation Act was exclusive (subject only to

[7] The district court also found that the referee's independent finding that Globe earned no excessive profits under the Renegotiation Act was "well supported" (R. 507).

redetermination by the Tax Court), and that the failure to petition the Tax Court for redetermination of the Board's order "precluded [the assertion of] any defense" in the bankruptcy proceeding to the claim based on that order (R. 535–536).

## ARGUMENT

The trustee in bankruptcy here, as well as in the proceedings below, challenges only the right of the Government to assert the Contingent Fee and Renegotiation claims against the bankrupt's estate. That is the single right which the Government asserted, which the court below accorded, and which arose as a result of the peculiar set of facts here involved. No similar set of claims has ever been asserted by the Government in any other bankruptcy proceeding.[8]

The issue here is thus narrow and of no general importance in the bankruptcy field. Moreover, the decision of the court below, according the United States the right to assert its two claims in the bankruptcy proceeding, was plainly correct, is supported by previous holdings of this Court, and involves no conflict of rulings among

[8] Petitioner recognizes that this bankruptcy case is "the only case" involving a contingent fee claim by the Government (Pet. 25). Similarly, the Government, in but one other case, has had occasion to assert a renegotiation claim against a contractor as to whom a petition in bankruptcy was filed prior to the date of the order formally determining his excessive profits. See *Rumsey Manufacturing Co.*, Bankruptcy No. 36448 (W. D. N. Y.).

the lower courts. Accordingly, further review by this Court does not appear to be warranted.

1. *Contingent Fee Claim*

(a) It has long been recognized that contingent fees for the procurement of Government contracts are invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure, with a consequent increase in costs to the public. *Tool Company* v. *Norris,* 2 Wall. 45, 54–56; *Trist* v. *Child,* 21 Wall. 441, 446–452; *Oscanyan* v. *Arms Company,* 103 U. S. 261, 271–273; *Hazelton* v. *Sheckells,* 202 U. S. 71, 79; *Crocker* v. *United States,* 240 U. S. 74, 78–79; *Muschany* v. *United States,* 324 U. S. 49, 64–65.

During World War I, these same considerations, coupled with the wartime increase in the number of "influence peddlers" who represented to businessmen that they could obtain Government contracts through pressure or influence, resulted in a Presidential ban on the payment of any commissions at all for procuring such contracts. Hearings, Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments (*Influence in Government Procurement*), 81st Cong., 1st Sess., pursuant to S. Res. 52 (1949) 12.

This prohibition, required to be inserted as a standard covenant in all Government contracts awarded after June 18, 1918, forbade all commissions or contingent fees to agents for contracts

with the Government irrespective of whether the sales agency was bona-fide and had been in business for a considerable period of time. Hearings, House Committee on Naval Affairs, 78th Cong., 1st Sess., on H. Res. 30 (1943) 382. While this ban effectively eliminated the employment of those who traded upon purported influence or other improper methods, its all-inclusive nature also precluded the employment of accredited and established sales representatives or manufacturers agents who represented their principals in selling to commercial customers and had been hired because of their familiarity with the products sold. To allow these bona-fide agents to continue the proper representation of their clients, the covenant was amended in 1924 by exempting "bona fide established commercial or selling organizations maintained by the contractor for the purpose of securing business." Hearings, House Committee on Naval Affairs, 78th Cong., 1st Sess., on H. Res. 30 (1943) 384.[9] And, in order to effectuate this objective, the exception, with respect to World War II contracts, has been administratively interpreted to exempt "only those agents who (1)

[9] The identical covenant, along with this exception, was written into the contracts here involved pursuant to Executive Order 9001, 6 F. R. 6787, 6788; R. 8. See also Section 4 (a), Armed Services Procurement Act, Act of February 19, 1948, 62 Stat. 21; Section 304 (a), Federal Property and Administrative Services Act, Public Law 152, 81st Cong., 1st Sess.; S. 2369 and S. 2371, 81st Cong., 1st Sess.; S. Report No. 1232, 81st Cong., 2d Sess. pursuant to S. Res. 52 (1950) 34.

have had a certain continuity of service, going back well before the war; (2) have represented their principals in selling to commercial customers as well as to the Government; and (3) have been employed because of their familiarity with the products sold, not because of their knowledge of Government procedure or acquaintance with Government officials." H. Rep. No. 353, 78th Cong., 1st Sess., on H. R. 1900 (1943) 5.

(b) It is this exception upon which petitioner relies in urging that the Government's claim for recovery of the contingent fees in this proceeding may not succeed. The argument is that Globe's retention of Production to solicit Government business and its payment of contingent commissions to Production on that business did not violate the covenant against contingent fees because Production was "a bona fide established commercial or selling agenc[y] maintained by" Globe. But Production, as pointed out by the court below, meets none of the express requirements of the exceptive language (R. 528).

It cannot be seriously questioned that Production was not a "bona-fide, established commercial or selling agency." Incorporated in 1939, its business was originally that of "buying assets of defunct banks" (R. 321, 322). It assumed its present name in 1941, but not until 1943, when wartime procurement was exceptionally high, did it describe its business as "Production Engineers

and Sales Representatives" (R. 323–324). Globe's president admitted he hired Production to assist in making "approaches * * * to the representatives of the Government in order to get contracts" (R. 212–213). These circumstances, when considered along with the above-outlined history, purpose, and administrative construction of the exception proviso, fully demonstrate the correctness of the ruling of the court below that Production "was not such [a bona-fide] established agency" as was contemplated by that exception (R. 529).

In any event, the fact that Production was not "maintained" by Globe for the purpose of securing business and, for that reason, is not within the exception, is indisputable. The purpose of that condition is plain. It allowed contractors, who had regularly been employing agents in selling their products generally, to continue to use those agents and thus continue "to do business in their accustomed way" even though the Government was the purchaser. *Reynolds* v. *Goodwin-Hill Corporation,* 154 F. 2d 553, 555 (C. A. 2). As reiterated by the court below on rehearing, the purpose of the exception and its "use of the word 'maintained,' was to allow contractors to continue the existence of something already in use, not to introduce a special method of securing

government contracts" (R. 575).[10] Here, Globe fully recognized that the payments to Production were not customary and routine but, on the contrary, "payments made by [Globe] not in the ordinary course of business" (R. 262, 389). Furthermore, since Globe's sales, prior to its contingent fee agreement with Production, were never made through Production but were handled by various established distributors on an entirely different basis (R. 201, 388–389), it is obvious that Globe was not "maintaining" Production within the meaning of that word as used in the exception, but was actually introducing a new technique to obtain Government contracts when it hired Production.[11]

(c) It is further argued that even if Production does not come within the exception, the Government has waived its right to claim the

[10] It is significant that *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, relied on by petitioner (Pet. 49), completely overlooks the presence of the word "maintained" in the exception.

[11] That this was the reasoning employed by the Court below in interpreting the word "maintained" as it affected the Globe-Production relationship is apparent from its opinion on rehearing (R. 575–576). Petitioner nevertheless suggests that the court below construed the word "maintained" to exclude *any* independent agent (Pet. 16). While its original opinion may be susceptible of such a reading, the opinion on rehearing gives the word the much more restricted meaning, which is not challenged nor even mentioned by petitioner, and under which Production could not qualify, as noted above, p. 14, even if its independent status were assumed not to preclude it from coming within the exception.

contingent commissions because it affirmatively exercised its discretion so as not to deduct the commissions when paying the full contract price to Globe (Pet. 56).

The short answer to this contention is that there is nothing in the record to show any such exercise of discretion on the part of the Government. Petitioner infers from the Government's payment of the full contract price to Globe, after it had been apprised of Globe's arrangement with Production, that the Government exercised its discretion "not to deduct" (Pet. 56). However, petitioner ignores the more likely inference that the procurement officers, while aware of the contingent fee arrangement, may not have notified the disbursement officers in time for them to deduct the commissions from the contract price. The Technical Service Command and Procurement Division's investigation of the Globe-Production arrangement was first completed on September 4, 1945, when the Acting Judge Advocate of the Service Command concluded that the covenant had been violated by Globe (R. 22). A month later the contracting officer made demand upon Globe for the amount of contingent commissions paid to Production in violation of the covenant (R. 82).[12] But prior thereto and at various times between 1942 and 1945, while the

[12] That Globe early recognized the claim so asserted by the Army in 1945 is evident from the prospectus which it filed with the Securities Exchange Commission and in which it

investigation had still been pending, the disbursing officers paid over to Globe almost twenty-two million dollars on one contract (R. 237, 365), and several additional millions on others (R. 369, 371, 373).[12] These payments in full to Globe, even before the investigation was completed, show that they probably resulted from an inadvertent error on the part of the disbursing officers in not discovering that the investigation was pending in other offices. In these circumstances, those payments in no way imply an affirmative exercise by any officer of his discretion not to deduct the commissions.

But, even assuming that those full payments could be so interpreted, that interpretation would not help petitioner. For, if the officer acted under the belief that he had discretion to waive the Government's rights to the contingent commissions, he was acting under a mistake of law. Contrary to petitioner's assumption, the covenant against contingent fees created no such thing as a discretion on the part of the officer not to deduct the commissions. The express terms of the covenant grant him discretion only to deduct rather than annul the contract. Those terms make it obvious that the only discretion vested in him

described its potential liability on the claim (R. 389–392). Globe, moreover, set up contingent reserves to provide for the amount of this claim (F. 433, 445).

[12] It was out of these payments that the $383,527.47 was paid by Globe to Production as contingent commissions (R. 101).

was to exercise his judgment so as not to annul the contract. Once the decision not to annul was made, there was no discretion left for him to exercise. Deduction of the contingent commissions then became an absolute requirement. It is obvious that the need of avoiding delays in completion of war contracts would make it advisable for the contracting authorities to have the discretion to allow the completion of even those contracts which had been negotiated by "influence peddlers." However, there was no similar reason to justify any failure to deduct after the contract was completed.

Whether payment of the full contract price in this case to Globe, without deduction, resulted from a factual mistake in making payment without awareness of the pending investigation, or from a mistake of law on the part of the officer as to the extent of the discretion he was authorized to exercise, is immaterial[14] in view of the long-settled principle that the Government is entitled to recover any money paid out by a public officer by mistake either of fact or of law. *United States* v. *Wurts,* 303 U. S. 414; *Wisconsin Central R'D* v. *United States,* 164 U. S. 190, 212; *United States* v. *Burchard,* 125 U. S. 176; *Heidt* v. *United States,* 56 F. 2d 559 (C. A. 5), certiorari denied,

[14] Whatever the cause, it is obvious that the magnitude and complexities of the Government's fiscal operations, especially in wartime, will inevitably result in such mistaken overpayments.

287 U. S. 601; *Granzow* v. *Village of Lyons, Ill.*, 89 F. 2d 83 (C. A. 7). The fact that no such mistake was made in *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, relied on by petitioner (Pet. 56), is sufficient to show the complete inapplicability of that case here.[15]

### 2. *Renegotiation Claim*

In contesting the right of the Government to assert this claim, the trustee's main argument is that the filing of the involuntary bankruptcy petition against the debtor stripped the War Contracts Price Adjustment Board of its power to continue the statutory renegotiation proceedings and shifted that power to the bankruptcy court.

A bankruptcy court, generally, has exclusive control over the administration of an estate in its possession. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483; *Straton* v. *New*, 283 U. S.

[15] Petitioner also argues that the deduction of the contingent commissions constitutes a penalty and is therefore unenforceable under *Priebe & Sons* v. *United States*, 332 U. S. 407. That case, however, fully recognizes the right of the Government, as a contractor, to provide for liquidated damages in the event of a breach, wherever the damages are "fair and reasonable attempts to fix just compensation for anticipated loss," 332 U. S. 407, 411. As early as the Civil War, this Court observed that the contingent commissions arrangement caused "unnecessary expenditures of the public funds" *Tool Co.* v. *Norris*, 2 Wall. 45, 54; see, *Crocker* v. *United States*, 240 U. S. 74. Obviously, the fair and reasonable basis for computation of the damage so caused the Government is the amount of the contingent commissions constituting the "unnecessary expenditure."

318. But, as this Court has observed, it does not follow that Congress gave "the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." *Callaway* v. *Benton,* 336 U. S. 132, 142. Thus, where Congress has created an administrative agency and given it exclusive authority to deal with certain disputes, the district court in charge of a Bankruptcy Act proceeding must allow those disputes to be adjudicated by that agency. *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561.

Here the disputed claim concerned the determination of excessive profits under the Renegotiation Act. Congress, by that Act, created a War Price Contracts Adjustment Board and expressly empowered it to determine "the amount, if any, of such excessive profits." Section 403 (d) (1), and 403 (c) (1), *infra,* pp. 26, 24. That Act also allows any contractor, aggrieved by a Board determination, to petition the Tax Court for a *de novo* redetermination of excessive profits. Section 403 (e) (1), *infra,* p. 26. In the absence of the filing of such a petition, the Act makes the Board order "final and conclusive" and further provides that the order "shall not be subject to review or redetermination by any court or other agency." Section 403 (c) (1), *infra,* p. 24.

Both Globe and the trustee, in the instant case, had notice of the renegotiation proceedings which were instituted by the Board before the filing of

the bankruptcy petition (R. 535; R. 399, 461–463; R. 400). After termination of those proceedings, notification of the Board's order determining the amount of excessive profits was also made (R. 396–397). However, no petition was filed with the Tax Court. This failure to invoke the "one and only procedure [provided by the Act] to secure a redetermination of the excessive profits" made the Board's order final and conclusive and immune from attack or reexamination by any other court. *Lichter* v. *United States*, 334 U. S. 742, 790, 792. In holding that the bankruptcy court, therefore, was precluded from redetermining the excessive profits,[16] the court below did no more, we submit, than apply the clear requirements of the Renegotiation Act (R. 535).[17]

Formal issuance of the Board order after the filing of the bankruptcy petition justifies no dif-

[16] It is true that a bankruptcy court is empowered to determine certain tax cases involving deficiency assessments against a bankrupt. But that power is specifically conferred on the court by Section 274 (a) of the Internal Revenue Code and Section 64 (a) (4) of the Bankruptcy Act. No similar power, with respect to renegotiation proceedings, has ever been conferred on the bankruptcy court by Renegotiation, Bankruptcy, or any other Act.

[17] This reasoning, petitioner intimates, was abandoned by the court below, on petition for rehearing (Pet. 58). The opinion on rehearing, however, merely sets forth additional grounds requiring a reversal of the district court's ruling on the Renegotiation Claim. Those additional reasons are fully consistent with those in the earlier opinion.